Supreme Court, U.S.
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No. 93-708

In the Supreme Court of the United States

OCTOBER TERM, 1993

CAROL J. APPLEWHITE, PETITIONER

v.

UNITED STATES AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that respondents—three United States Air Force law enforcement agents who seized, searched, and detained petitioner, a civilian, in the course of a military drug "sting" operation—are entitled to qualified immunity from suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 995 F.2d 997. The memorandum opinion and order of the district court (Pet. App. 15a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1993. A petition for rehearing was denied on August 10, 1993. Pet. App. 31a-32a. The petition for a writ of certiorari was filed on November 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In an effort to combat illegal drug activity by enlisted personnel attached to Kirtland Air Force Base in Albuquerque, New Mexico, agents of the United States Air Force Office of Special Investigations (OSI) conducted an undercover sting operation on August 1, 1986.[1] On that day, petitioner Carol J. Applewhite (petitioner) accompanied her husband, William Applewhite, an Airman First Class stationed at Kirtland (Airman Applewhite), to the off-base Albuquerque apartment where the OSI agents were conducting the operation. Petitioner, then an employee of the United States Postal Service, was wearing her Postal Service uniform. At the apartment, Airman Applewhite purchased marijuana from the OSI agents and was arrested. Pet. App. 2a-4a.

The agents conducted a pat-down search of petitioner during which a syringe and a hypodermic needle were discovered in her sock and amphetamines were discovered in her purse. Petitioner was subsequently handcuffed and transported, along with her husband, to Kirtland. At the base, petitioner was partially strip-searched, questioned by OSI personnel, and then detained in a conference room for approximately two to three hours. During this time, the OSI called the Albuquerque Police Department to inform them that a civilian was being held in custody. The Albuquerque Police declined to investigate the matter and petitioner was released. OSI later reported the events to the Postal Service, following

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[1] Two of the respondents who participated in the OSI sting (Faulkner and Ross) apparently were local police "borrowed" by the military for purposes of the operation. Pet. App. 23a.

which petitioner lost her job. Airman Applewhite was court-martialed for his offense. Pet. App. 4a-5a.

Petitioner filed the instant *Bivens*[2] action against six Air Force officials for allegedly violating the Posse Comitatus Act, 18 U.S.C. 1385, and the Fourth and Fifth Amendments. Pet. App. 6a. Only three of the individual defendants—respondents Randall L. Faulkner, Leonard Ross, and William E. McBride—were properly served. *Id.* at 15a, 17a.

2. Respondents Faulkner and Ross moved for summary judgment on the ground of qualified immunity. In an order dated August 24, 1989, the district court denied that motion. Pet. App. 17a. The court stated that "law enforcement officers generally know that it is clearly established law that they have absolutely no authority to go outside the confines of a military installation and arrest a civilian, transport her to a military installation, detain and strip search her." *Id.* at 18a.

Following discovery, all three individual respondents filed a motion for summary judgment, asserting an entitlement to qualified immunity on the ground that it was not clearly established that the Posse Comitatus Act "would encompass a case like this where 'a civilian is swept up in an operation intended to detect and punish wrongdoing by military personnel.'" Pet. App. 25a. The district court denied the motion, stating that "it is the law of this case that

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[2] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner also asserted a claim against the United States under the Federal Tort Claims Act for the torts of false arrest and illegal detention. Pet. App. 17a. That claim is not at issue here.

what is alleged to have happened to [petitioner] involved a violation of clearly established law." *Ibid.*

3. The court of appeals reversed the district court's denial of summary judgment and remanded the case to the lower court with directions to grant summary judgment to respondents and dismiss the action on the ground of qualified immunity. Pet. App. 14a.

The court of appeals first concluded that the OSI agents had acted reasonably at all times. In the court's view, when Airman Applewhite was arrested "the search of his wife was reasonable to be sure she posed no threat to the agents." Pet. App. 10a (citing *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968)). Because that search revealed that petitioner was in possession of amphetamines and a syringe with a hypodermic needle, the court concluded that it was "reasonable for the agents to regard her as a participant with him in a narcotics buy and remove her *somewhere* while the Albuquerque Police were contacted to see if they would take over this civilian intruder/participant in the military 'sting.' The agents were not required to let her go, given what they had learned about her, nor were they required to hold her in the 'sting' apartment or in a car while waiting for an answer from the Albuquerque Police Department." Pet. App. 11a (citations omitted). Finally, the court concluded that "the partial strip search at the base was the product of particularized, reasonable suspicion and was not unreasonable, particularly in view of what the pat-down search at the apartment had already revealed." *Id.* at 11a-12a.

The court of appeals next ruled that there had been no violation of the Posse Comitatus Act. The court

first noted that the Posse Comitatus Act was "designed to restrict military involvement in civilian law enforcement" and "is not intended to limit the military in preventing illicit drug transactions by active duty military personnel, whether such conduct occurs on or off a military installation." Pet. App. 12a (citation omitted). In this case, the court reasoned, "[s]ince there was an independent military purpose to OSI's conduct, there was necessarily no wilful use of any part of the Air Force as a posse to execute civilian laws, nor did military law enforcement officers go outside the confines of a military installation to arrest a civilian as the Court below viewed it. The agents went off base to 'sting' military personnel, not civilians." *Id.* at 12a-13a.

Finally, the court of appeals held that respondents did not violate petitioner's Fourth and Fifth Amendment rights. The court noted that, because petitioner was both present at the drug sting and in possession of contraband, "it was objectively reasonable for the agents to detain [petitioner] somewhere long enough to inquire as to whether civilian authorities had any interest in taking over any prosecution. In these circumstances, the agents could hardly have justified her immediate release just because she was a civilian." Pet. App. 13a-14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly determined that the OSI agents did not violate petitioner's Fourth

Amendment[3] rights. Based upon what it termed the "undisputed facts" of the case, the court of appeals held that respondents' conduct was "objectively reasonable." Pet. App. 13a. Petitioner does not contend otherwise in her petition. Instead, she argues that by violating the Posse Comitatus Act,[4] respondents violated the Fourth Amendment. This is the way in which the district court understood petitioner's complaint. See Pet. App. 17a (petitioner's *Bivens* action "is based on the alleged violation of a federal statute designed to keep the military out of civil law enforcement, the Posse Comitatus Act, 18 U.S.C. § 1385").[5]

Citing *Bissonette* v. *Haig*, 800 F.2d 812 (8th Cir. 1986) (en banc), aff'd for absence of a quorum, 485 U.S. 264 (1988) (per curiam), petitioner asserts that her "*Bivens* claim is well grounded in existing caselaw."

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[3] Because petitioner's Fifth Amendment claim is not differentiated from her Fourth Amendment claim, it "has no independent significance." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985).

[4] The Act provides that "[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. 1385.

The phrase "posse comitatus" is derived from the early common law where it referred to the entire population of a county above the age of 15 from whom the sheriff might draw to aid him in the execution or enforcement of the law. See *Black's Law Dictionary* 1162 (6th ed. 1990).

[5] A *Bivens* action will not lie for the violation of a federal statute. The Posse Comitatus Act is a criminal statute that provides for fines or imprisonment for violations.

Pet. 15. In *Bissonette*, the Eighth Circuit held that a violation of the Posse Comitatus Act is a per se violation of the Fourth Amendment and that a violation of the Act therefore states a constitutional claim actionable under *Bivens*. This Court granted a petition for certiorari in *Bissonette* but affirmed for lack of a quorum.[6]

The court of appeals correctly determined, however, that the Posse Comitatus Act was not violated in this case. That law prohibits the Army and Air Force from participating in civilian law enforcement except where Congress has expressly authorized those service branches to do so.[7] In this case respondents were not participating in civilian law enforcement. Rather, the OSI operation was intended to enforce military law against military personnel.[8] As the court of appeals found, "[t]he agents went off base to 'sting' military personnel, not civilians." Pet. App. 13a; see also *id.* at 10a ("Here, the military ha[d] set up a 'sting' for errant military personnel."). Where the primary purpose of the military activity is to enforce military law, the Posse Comitatus Act is

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[6] Under 28 U.S.C. 2109, such a decision has the same effect as an affirmance by an equally divided Court. *Bissonette* has not been followed by any other circuit. The United States took the position in its brief in *Bissonette* that a violation of the Posse Comitatus Act does not, *ipso facto*, constitute a Fourth Amendment violation.

[7] A number of statutes authorize the use of the military to enforce civilian law. See 32 C.F.R. 213.10(a)(2)(iv) (1992) (listing such statutes).

[8] It was, of course, within the jurisdiction of the OSI agents to conduct an off-base sting against military personnel. See *Solorio* v. *United States*, 483 U.S. 435 (1987).

not violated. See *United States* v. *Thompson*, 33 M.J. 218, 220 (C.M.A. 1991) ("Thus, the relevant question * * * is: What was 'the primary purpose of' the OSI agents' involvement in the search and seizure at appellant's off-base apartment?"), cert. denied, 112 S. Ct. 972 (1992); *State* v. *Poe*, 755 S.W.2d 41, 45 (Tenn. 1988) ("In this case the actions of the military officers were performed primarily to accomplish military purposes."), cert. denied, 490 U.S. 1085 (1989); *Harker* v. *State*, 663 P.2d 932, 936 (Alaska 1983) ("In the majority of cases in which no violation has been found, the independent military purpose that justified the military conduct was the prevention of illicit drug transactions involving active duty military personnel, regardless of whether such conduct took place on military installations."). See also *Hayes* v. *Hawes*, 921 F.2d 100, 103 (7th Cir. 1990).

Petitioner complains that there was "no coordination with the civilian authorities to deal with civilian participants until after the fact." Pet. 21; see also Pet. 7. The evil at which the Posse Comitatus Act is aimed, however, is the use of the military to enforce civilian law. The Act imposes no requirement upon the military to coordinate its own efforts to enforce military law with civilian authorities. Petitioner cites two cases in which she claims "there was active coordination between military and civilian authorities prior to and at the time of the 'bust.'" Pet. 7 (citing *Taylor* v. *State*, 645 P.2d 522 (Okla. Crim. App. 1982); *United States* v. *Walden*, 490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974)). In both of those cases, however, it was the very act of military-civilian coordination that allegedly violated the Posse Comitatus Act.

Finally, even if the Posse Comitatus Act was violated in this case, it could not be said that the violation was committed "willfully," as the statute contemplates. Because petitioner's arrival at the sting apartment was unanticipated (Pet. App. 13a), there was no deliberate attempt to use the military to conduct civilian law enforcement.

2. Petitioner argues that the court of appeals' decision is contrary to recent congressional enactments. Pet. 17-24. That is not so. Whether to clarify or alter the Posse Comitatus Act, the Congress enacted 10 U.S.C. 375 (Supp. IV 1992), which, as amended, provides:

> The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity * * * under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

Pursuant to that law, the Secretary of Defense promulgated implementing regulations which provide in relevant part that

> The following activities are not restricted by the Posse Comitatus Act * * * notwithstanding direct assistance to civilian law enforcement officials.
>
> Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental ben-

> efits to civilian authorities. * * * Actions under this provision may include the following * * *
>
> Actions related to enforcement of the Uniform Code of Military Justice (10 U.S.C. Chapter 47).

32 C.F.R. 213.10(a)(2)(i)(A) (1992).[9] As noted previously, the court of appeals found that the purpose of the drug sting was to enforce military law. See Pet. App. 10a, 13a. Accordingly, the court of appeals' decision is not contrary to the Posse Comitatus Act, 10 U.S.C. 375, or Defense Department regulations.

3. Petitioner suggests that this Court should grant certiorari "to clarify [her] remedy in this case." Pet. 29. Relying on this Court's statement in *Laird* v. *Tatum*, 408 U.S. 1, 15-16 (1972), she argues that some remedy, whether in the form of damages or an exclusionary rule, must exist for violations of the Posse Comitatus Act.[10] This is not an appropriate case for addressing that issue because there was no such violation here.

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[9] In 1993, the Secretary of Defense removed these regulations from the Code of Federal Regulations, see 58 Fed. Reg. 25,776 (1993), but they remain Defense Department policy. See DoD Directive 5525.5 (Restrictions on Participation of DoD Personnel in Civilian Law Enforcement Activities).

[10] The Posse Comitatus Act subjects its violators to a maximum fine of $10,000, two years' imprisonment, or both.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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